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February 1, 2012

VIA EMAIL: TANDERSEN@FEC.GOV
AND VIA US MAIL

Thomas Andersen, Esq.
Federal Election Commission
999 E Street Northwest
Washington, DC 20463

RE: MUR 6465
Natalie Wisneski

Dear Mr. Anderson:

This letter is in response to your letter dated January 12, 2012 in which the FEC indicated that it has "reason to believe" that our client, Natalie Wisneski ("Ms. Wisneski"), knowingly and willfully violated 2 U.S.C. §§ 441(b)(a) and 441(f). The FEC requested submission of any additional materials which Ms. Wisneski deemed relevant to the FEC's further consideration of this matter. Please accept the following in response.

In our last letter of May 24, 2011 to the FEC, we indicated that both the Arizona State Attorney General's Office and the U.S. Attorney's Office for the District of Arizona were investigating the allegations which are the subject of FEC inquiry. The federal investigation has since concluded. On November 30, 2011, Ms. Wisneski was indicted by the U.S. Attorney's Office for violations of 2 U.S.C. § 441(f) and other charges relating to her alleged participation in campaign contributions by the Fiesta Bowl to various political candidates. The trial is currently scheduled before Judge James Teilborg in the federal District Court of Arizona on March 7, 2012.

Because of the pending trial date, Ms. Wisneski cannot comment directly to any of the charges or accusations made in your letter. As I am sure you are aware, any remarks addressing the allegations could be used in Ms. Wisneski's trial. Accordingly, we would request that any final decision made by the FEC, with respect to allegations, be continued until the resolution and final disposition of Ms. Wisneski's criminal case. We do not anticipate that the case will last much longer, so we respectfully request that the FEC delay this matter until that time.

We also encourage the FEC to consider our comments made previously. The federal case alleges nine separate counts, seven of which are felony charges. The investigation and the pending indictment have exacted a great toll upon Ms. Wisneski, and she faces the very real prospect of being branded a felon, a label which she will have to carry for the rest of her life. We respectfully submit that any decision by the FEC to seek further redress, in addition to a nine count federal indictment, is redundant and not in the public interest.

Ms. Wisneski also filed a brief addressing the legal merits of the campaign contribution allegations last Friday, January 26, 2012. We have attached a copy of the brief for your consideration. As explained in the brief, the Fiesta Bowl's and Ms. Wisneski's involvement in the alleged campaign contribution activities are no longer illegal. Pursuant to *Citizens United v. Federal Election Commission*, -- U.S. --, 130 S.Ct. 876, 897-898 and *United States v. Danielczyk*, 91 F.Supp.2d 513 at *5 (E.D. Va. 2011), corporations are now free to make unlimited campaign contributions to both political action committees and to individual political candidates. Because of this new precedent, the charged statute of 2 U.S.C. § 441f of making campaign contributions in the name of another is no longer constitutional given that corporate campaign contributions are now allowed. (Please read the attached brief for a full explanation of the argument.) The District Court of Arizona has yet to decide the motion, but in the event Ms. Wisneski receives a favorable ruling, we would encourage the FEC to discontinue its investigation.

Lastly, we want to reemphasize that Ms. Wisneski fully cooperated with the internal Fiesta Bowl investigation conducted by the law firm of Robins Kaplan in Minneapolis. This investigation serves as the entire basis for the FEC's reported conclusions to date. As can be attested to by members of that firm, Chris Madel and Bruce Manning, Ms. Wisneski was instrumental in that investigation and cooperated fully. Many facts were unearthed from Ms. Wisneski's information which otherwise would not have been discovered. We ask that the FEC consider Ms. Wisneski's cooperation.

We hope that this letter has sufficiently addressed the FEC's concerns. At a minimum, we request a delay of this proceeding until such time the criminal case and the pending motion are resolved.

If you have any questions or concerns, you may call me directly at 602-229-5768. Thank you for your consideration.

Very truly yours,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. NATALIE WISNESKI, Defendant.	CR 11-2216-PHX-JAT (MHB) **DEFENDANT'S MOTION TO DISMISS COUNTS 1 THROUGH 4 OF INDICTMENT, PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 12**

Defendant Natalie Wisneski ("Ms. Wisneski"), by and through undersigned counsel, respectfully requests that the Court dismiss Counts 1 through 4 of the Indictment for failure to state an offense. In Counts 1 through 4, the government alleges that Ms. Wisneski, acting on behalf of the Fiesta Bowl, caused Fiesta Bowl employees to make federal campaign contributions and then reimbursed these employees, in an effort to circumvent the federal law which bans corporations from making such contributions. Pursuant to *Citizens United v. Federal Election Commission,* --U.S. --, 130 S.Ct. 876 (2010) and *United States v. Danielczyk,* 791 F.Supp.2d 513 (E.D. Va. 2011), the law forbidding independent corporate expenditures and direct corporate contributions has been declared unconstitutional.

The underlying crime (2 U.S.C. § 441f), which lays the foundation for Counts 1 through 4, is no longer a criminal act. Accordingly, Counts 1 through 4 fail to state offenses and should be dismissed with prejudice. This Motion is supported by the following Memorandum of Points and Authorities and the entire record in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND.

Ms. Wisneski has been charged in Counts 1 and 4 of the Indictment of allegedly making, together with others, illegal campaign contributions to certain political candidates. In her capacity as an officer of the Fiesta Bowl, the government alleges that Ms. Wisneski, upon orders from superiors, solicited and caused Fiesta Bowl employees to individually submit checks payable to a candidate, and later ensured and caused the reimbursements back to the employees. Per the government, such contributions are illegal because the contributions reflected payments of the Fiesta Bowl employees rather than the Fiesta Bowl entity itself, in violation of 2 U.S.C. § 441f. The grand whopping total of these federal contributions is some $20,000.00 (in this nine count indictment).

In addition to the overkill, the government has missed the mark by its failure to correctly analyze the governing statutes and law pertaining to federal contributions in light of *Citizens United v. Federal Election Commission* and later case authority. Corporations are now permitted to make campaign contributions directly to both political action committees and candidates. The charged statute, 2 U.S.C. § 441f, no longer makes sense given this new case authority. There is nothing Ms. Wisneski did that can now be characterized as wrong-- let alone deemed illegal.

The government has stretched in its attempts to prosecute members of the Fiesta Bowl and get those whom it has put into the box of the "higher ups." These charges reflect the political motivations of this prosecution. As explained below, these counts should be dismissed.

II. THE INDICTMENT FAILS TO STATE AN OFFENSE AS TO COUNTS 1 THROUGH 4, AND THEREFORE SHOULD BE DISMISSED.

A. The Legal Standard for a Motion to Dismiss Counts 1 Through 4.

Federal Rule of Criminal Procedure 12(b)(2) provides that a party "may raise by pretrial motion, any defense, objection, or request that the court can determine without a trial of a genuine issue." Fed. Rule Crim. P. 12(b)(2). Additionally, a motion alleging a defect in the indictment must be made before trial. Fed. Rule Crim. P. 12(b)(3). A motion to dismiss an indictment is "generally 'capable of determination' before trial 'if it involves questions of law rather than fact.'" *See United States. v. Nukida*, 8 F.3d 665, 669 (9th Cir. 1993) (citing *United States. v. Shortt Accounting Corp.*, 785 F.2d 1448, 1452 (9th Cir. 1986)); see also *United States v. Smith*, 866 F.2d 1092, 1096 (9th Cir. 1989). Although the Court may make preliminary findings of fact necessary to decide the legal questions presented by the motion, the court may not invade the province of the ultimate finder of fact. *Id.*

Because the charged statutes are now unconstitutional under *Citizens United v. Federal Election Commission* and its progeny (as discussed below), Counts 1 through 4 fail to state a claim for relief.

B. The United States Supreme Court's Ruling in *Citizens United v. Federal Election Commission*, – U.S. –, 130 S.Ct. 876 (2010).

The Federal Election Campaign Act ("FECA"), which was enacted in 1972, places monetary limits on contributions to support or defeat candidates for federal office and prohibits certain contributions. *See generally,* 2 U.S.C. § 431, *et. seq.* The FECA originally "prohibit[ed] a corporation from making any campaign contribution to a candidate for federal elective office." [*See* DKT. 1 at ¶ 10.] Under 2 U.S.C. § 441b(b), corporations were prohibited from spending general funds on electronic communications, or for any speech which advocated either the defeat or election of a federal candidate. *Id.*

Additionally, corporations, including non-profit corporations, were also prevented from making contributions or expenditures in connection with: (i) any election to political office; (ii) any primary election, political convention or political caucus; or (iii) any election in which presidential and vice presidential electors or a Senator or Representative in Congress are to be voted for. *See* 2 U.S.C. § 441b(a).

However, in January 2010, the United States Supreme Court entirely changed the landscape of federal campaign contributions by declaring that 2 U.S.C. § 441b is unconstitutional with respect to the restrictions on corporate independent expenditures. *See Citizens United v. Federal Election Commission,* -- U.S. --, 130 S.Ct. 876, 897-898 (2010). In *Citizens United,* the Supreme Court held that corporations and unions have the same First Amendment rights as individuals; and that a "prohibition on corporate independent expenditures is thus a ban on free speech." *Citizens United,* 130 S.Ct. at 898. In the decision, the Court re-emphasized and affirmed its prior holding in *First Nat. Bank of Boston v. Bellotti,* that "political speech does not lose First Amendment protection simply because its source is a corporation." *Citizens United,* 130 S.Ct. at 900 (quoting *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 784 (1978) (internal citations omitted)).

The Court further concluded "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United,* 130 S.Ct. at 884. Pursuant to the Court's ruling, corporations are now permitted to spend unlimited monies on independent corporate expenditures and freely make contributions to political actions committees ("PAC's") in order to persuade voters and advocate for certain candidates.

Importantly, the litigation in *Citizens United* was brought by a wealthy non-profit corporation that ran a PAC; and the holding therefore was limited to the issue before the Court -- whether corporations could make independent expenditures to PACs and other

groups in order to support or oppose a candidate running for political office. The case left unresolved the issue of whether corporations could indeed make direct contributions directly to the candidates themselves. Given the Court's rationale in *Citizens United* that a limitation on contributions constitutes an infringement upon free speech, presumably the Supreme Court and other courts would similarly conclude and hold that the prohibition would no longer apply to corporate contributions made directly to candidates.

C. The Holding in *Citizens United* Has Now Been Extended to Include Contributions Made to Individual Candidates.

Just recently, this precise issue was addressed in *United States v. Danielczyk*, 91 F.Supp.2d 513 at *5 (E.D. Va. 2011) (emphasis added) in which the Eastern District of Virginia expanded the Supreme Court's ruling in *Citizens United*. The Court held that "individuals and corporations must have equal rights to engage in both independent expenditures **and** direct contributions" to political candidates. *Id.* In the case, two defendants, acting on behalf of a corporation, were charged with illegally soliciting and reimbursing campaign contributions to Hillary Clinton's 2006 Senate Campaign and 2008 Presidential Campaign. *Id.*, 791 F.Supp.2d 513 at *2. The defendants had reimbursed several employees who had contributed monies to attend two fundraisers associated with these campaigns, and were subsequently indicted on various criminal charges. *Id.*

The defendants argued that under Supreme Court's ruling in *Citizens United*, the corporate direct donations ban to political campaigns indeed violated the First Amendment as an infringement upon free speech. *Id.* The government conversely argued that the *Citizens United's* ruling was "limited to independent political expenditures," and that "the constitutionality of the corporate direct donations ban is a settled question under *FEC v. Beaumont*, 536 U.S. 146 (2003)." *Id.*

The District Court thoroughly analyzed the Supreme Court's rulings in both *Beaumont* and *Citizens United*, and determined that *Beaumont*, which applied only in the

context of non-profit advocacy corporations[1], was inapplicable to the facts of this case. *Id.* The Court reasoned that *Citizens United* "requires that corporations and individuals be afforded equal rights to political speech unqualified." *Id.* at *5. The Court further held that as applied to the case, **the flat ban on direct corporate contributions to political campaigns is unconstitutional.** *Id.* (emphasis added).

Thus, it is now settled law and no doubt that corporations can make unlimited political contributions to both PAC's and individual candidates under *Citizens United* and *Danielczyk.*

D. *Citizens United* and *Danielczyk* Apply to the Instant Case (and in context of 2 U.S.C. § 441f).

Ms. Wisneski, acting on behalf of the Fiesta Bowl, allegedly asked and requested Fiesta Bowl employees to contribute monies to John McCain 2008, Inc. and then assisted in the reimbursement of the employees for such contributions. Given that these monies were directed to John McCain's authorized committee, or principal campaign committee, the monies can be classified as direct, corporate contributions to John McCain. Under the holdings and new precedent of *Citizens United* and *Danielczyk*, the described acts can no longer be characterized as crimes.

As will be demonstrated at the trial herein, Ms. Wisneski had nothing to do with the origination or orchestration of making these contributions and reimbursements; but presumably, it was done by its designers to circumvent the prohibition of direct corporate contributions pre-*Citizens United.* It is evident also that the campaign contributions were all made in the name of another only because the Fiesta Bowl was prohibited from making such contributions under federal law **as it existed at that time.** Under the pre-

[1] In *Beaumont,* the United States Supreme Court held that 2 U.S.C. § 441b was constitutional as it was applied to **non-profit advocacy corporations** and was therefore consistent with the First Amendment. *Id.,* 536 U.S. at 149 (emphasis added). The Fiesta Bowl cannot be classified as a non-profit advocacy corporation, and therefore, an analysis under *Beaumont* is not applicable to the facts of this case.

Citizens United construction of 2 U.S.C. § 441b, the Fiesta Bowl was prohibited from: (i) spending money in order to advocate for the election of or defeat of a political candidate; and (ii) making any sort of campaign expenditure in connection with a political office.

In light of the freedom (post-*Citizens United*) for corporations to make independent expenditures and direct contributions, Ms. Wisneski did not engage in a criminal act by reimbursing Fiesta Bowl employees for direct contributions to John McCain, Inc. Given the unconstitutionality of 2 U.S.C. § 441b, not only is the Fiesta Bowl allowed to make corporate independent expenditures in order to influence a campaign for federal office; but in accordance with *Danielczyk*, the Fiesta Bowl is also permitted to make direct corporate contributions to political campaigns. Even if, as the government alleges, Ms. Wisneski asked Fiesta Bowl employees to make federal campaign contributions and reimbursed these employees for such contributions, such conduct is no longer illegal under *Danielczyk*.

The government nevertheless has alleged violations of 2 U.S.C. § 441f, which in its "black letter" form prohibits a person from making a contribution in the name of another. And technically, as alleged, Ms. Wisneski fits within the "black letter" form, because the contributions were made in the individual's name rather then the corporate name of the "Fiesta Bowl". **However,** 441f was promulgated and enacted prior to *Citizens United* and *Danielczyk*. While the Supreme Court and the *Danielczyk* court did not have the issue before them, the Courts undoubtedly would have likewise found 441f unconstitutional as applied to these facts, because it is now perfectly legal to make contributions to both PAC's and the individual candidates from the Fiesta Bowl. As such, given the holding in *Danielczyk*, 2 U.S.C. § 441f can no longer be deemed viable law.

Indeed, 2 U.S.C. § 441f was enacted in order to prevent both corporations and individuals from circumventing the campaign finance laws, and specifically 2 U.S.C. § 441b (which banned corporate contributions). If not for 2 U.S.C. § 441f, corporations

could make unlimited independent expenditures or unlimited direct contributions to a federal campaign, simply by using a conduit to make the expenditure or contribution on their behalf. Now under *Citizen's United,* the ban on corporate independent expenditures has been lifted permitting corporations to make unlimited independent expenditures in connection with a candidate running for federal office. *Id.*, 130 S.Ct. at 898. In essence, the holding in *Citizen's United* renders 2 U.S.C. § 441f moot. Corporations no longer need to utilize a conduit to make independent expenditures on their behalf, because corporations are now allowed to make any amount of independent corporate expenditure under federal law.

To the extent the government argues that Ms. Wisneski nevertheless violated 2 U.S.C. § 441f because the contributions were not in the actual name of the Fiesta Bowl, such an argument is nonsensical. It is now totally permissible under *Citizens United* for a company to **anonymously** make a million dollar contribution (or more for that matter) without any repercussion under 441f, whereas Ms. Wisneski can get prosecuted and convicted as a felon for $20,000.00 in contributions because the money wasn't labeled as "Fiesta Bowl money." Such an interpretation of the statute and result is absurd. This cannot be the intent now of 2 U.S.C. § 441f in the aftermath of *Citizens United* and *Danielczyk.*

Pursuant to the Court's holding in *Citizens United,* the Fiesta Bowl, a non-profit corporation, is now allowed to make independent corporate expenditures in order to influence the outcome of a federal election. As such, the crime which underlies Ms. Wisneski's alleged violations of 2 U.S.C. § 441f, no longer exists. Although 2 U.S.C. § 441f has not been expressly overturned or declared unconstitutional, it undoubtedly will and should be by this Court. The statute simply makes no sense given the rulings in *Citizens United and Danielczyk.* The only reason it hasn't is because the issue has not been addressed. This Court has the ability and opportunity to set the record straight.

III. CONCLUSION.

Pursuant to the United States Supreme Court's holding in *Citizens United* and the Eastern District of Virginia's ruling in *Danielczyk*, corporations are free to make independent expenditures and direct contributions to PACs and candidates for office. 2 U.S.C. § 441f in its current state and as charged in this case no longer makes any logical sense. The Fiesta Bowl was absolutely permitted to make political contributions to 2008 John McCain, Inc. It makes no difference whether the checks came from the Fiesta Bowl employee with reimbursements or from the Fiesta Bowl itself in light of the new case law.

Accordingly, Counts 1 through 4 of the Indictment must be dismissed.

RESPECTFULLY SUBMITTED this 27th day of January, 2012.

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By */s/ James L. Burke*
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CERTIFICATE OF SERVICE

I certify that on the 27th day of January 2012, I electronically transmitted the foregoing document to the Office of the Clerk of Court, using the CM/EFC System, for filing and for transmittal of a Notice of Electronic Filing to the following CM/EFC registrant(s):

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. NATALIE WISNESKI, Defendant.	CR 11-2216-PHX-JAT (MHB) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 1 THROUGH 4 OF INDICTMENT, PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 12**

Based upon Defendant Natalie Wisneski's Motion To Dismiss Counts 1 Through 4 of Indictment and good cause appearing,

IT IS HEREBY ORDERED dismissing Counts 1 Through 4 of Indictment.